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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH MICHAEL GARDNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 553 F. 2d 946.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1977. A petition for rehearing was denied on August 16, 1977 (Pet. App. 10). The petition for a writ of certiorari was filed on September 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether exigent circumstances supported the warrantless entry of petitioner's house.

2. Whether petitioner voluntarily consented to a search of a kitchen cabinet after the officers entered.

3. Whether petitioner met the burden of introducing enough evidence to call for resolution of his contention that the officers did not announce their purpose and authority before entering his house.

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine and marijuana, with intent to distribute those substances, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of seven and three years' imprisonment and was fined $5,000.

On July 2, 1975, Ronald Gunn, an informant for the Drug Enforcement Administration, arranged by telephone a drug transaction with petitioner (Tr. 13).[1] Gunn and federal agents flew from Atlanta to Fort Lauderdale (Tr. 13). A meeting was arranged, and the agents followed Gunn to the meeting place; they saw petitioner and Gunn leave in petitioner's car (Tr. 14), which they lost in the traffic (Tr. 15). Other agents had been watching petitioner's house, because they thought a kilogram of cocaine might be hidden there; those agents saw petitioner arrive accompanied by Gunn, and they notified the agents who had been trying to locate the pair (Tr. 16).

Petitioner and Gunn stayed in the house for approximately 20 minutes. When they emerged, Gunn gave a signal indicating that cocaine was in the house (Tr. 16). The agents, driving at least five cars, promptly moved in and arrested petitioner (Tr. 17, 52, 55, 57).

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[1]Gunn previously had been arrested after selling cocaine, which, he told the agents, he had obtained from petitioner's wife (Pet. App. 4).

Petitioner stated: "It's all over," and Gunn told one of the agents that a woman was still inside the house (Tr. 19, 20, 69). Petitioner and several agents entered the house, where they found petitioner's wife (Tr. 20). After petitioner had been read *Miranda* warnings and told that a warrant could be obtained to authorize a search (Tr. 21-22), he informed the agents to look for the cocaine in the kitchen cabinet. The agents found the cocaine there (Tr. 22).

ARGUMENT

1. Petitioner contends that the agents should have obtained a warrant before entering his house. The court of appeals properly held, however, that pressing circumstances justified immediate entry. The agents had reasons to believe a person was still in the house, and, having been made aware of the agents' presence by petitioner's arrest, might attempt to destroy the evidence. As the court of appeals stated (Pet. App. 6-7):

> The district court's finding of adequate justification for entry is not clearly erroneous. Gunn's signal provided ample probable cause for arrest. When Gunn told the agents someone was in the house, an immediate entry became necessary to prevent disposal of the cocaine, a powder which can easily be flushed down a toilet. The agents could logically have suspected that anyone inside the house would be well aware of the five police cars ringing the premises and the arrest of [petitioner] and Gunn. The danger that someone would dispose of the illicit drugs was especially great in this case because the agents knew the person in the house might be Susan Gardner, [petitioner's] wife and partner in the drug trade. Accordingly, the agents justifiably acted " 'now or never' to perserve the evidence of the crime." *Roaden* v. *Kentucky*, 413 U.S. 496, 505, 93 S. Ct. 2796, 2802, 37 L. Ed. 2d 757 (1973).

This is not a case in which agents deferred obtaining a warrant only to " manufacture" exigent circumstances. The agents did not acquire probable cause to search the house—and hence could not have obtained a warrant—until Gunn gave his signal.[2] They then acted promptly. Petitioner's real complaint is that they acted too promptly and should have retired to seek a warrant, but the reasonableness of a search under exigent circumstances is not diminished by the fact that the officers might have acted in some other way. *United States* v. *Santana*, 427 U.S. 38; *Cardwell* v. *Lewis*, 417 U.S. 583, 595-596 (plurality opinion); *United States* v. *Mitchell*, 538 F. 2d 1230, 1237 (C.A. 5) (*en banc*).

Vale v. *Louisiana*, 399 U.S. 30, on which petitioner relies (Pet. 12), does not support his position. *Vale* held that the search of a house after "the arresting officers [had] satisfied themselves that no one else was in the house" (399 U.S. at 34), was not based on exigent circumstances, and it does not stand for the proposition that in order to justify a warrantless entry there must be a showing that the items to be seized are in the process of destruction. The Court observed in *Vale* that this circumstance, which would establish exigency, was absent; it did not hold that ongoing destruction of evidence is an essential part of exigency.[3] See *McDonald* v. *United*

[2]According to petitioner's own testimony, the cocaine was not in his house on July 2, 1975, when Gunn first telephoned him (Tr. 78). Although the agents thought that petitioner might have had the drugs at his house, this was simply an informed suspicion not based on reliable information.

[3]The Court observed in *Vale* that the officers already had obtained two warrants for Vale's arrest and easily could have obtained a warrant to search his house (399 U.S. at 35). Here, by contrast, the officers could not have obtained a warrant of any sort until the informant gave his signal, and they then acted expeditiously.

States, 335 U.S. 451, 455, which indicates that exigency exists when "the property [is] in the process of destruction [or] * * * likely to be destroyed."[4]

2. After the agents had entered petitioner's house, petitioner consented to a search of his kitchen cabinet for cocaine. His contention that the consent was involuntary is not supported by the evidence.

Petitioner testified that he "volunteered the information" about the location of the cocaine because he was scared and feared the agents would harm his wife or himself (Tr. 73). But the agents never threatened petitioner (Tr. 72), they made no promises to him, and there is no indication of more subtle forms of coercion. Petitioner consented in his own home, rather than in the more coercive confines of a police station. Petitioner had received *Miranda* warnings. Petitioner's consent—like his earlier statement "[i]t's all over"—was no more than a recognition that he had been caught red-handed and that it was pointless to require the agents to procure a warrant that would have allowed them to search the entire house. The consent narrowed the search to one kitchen cabinet. It was voluntary in light of the totality of the cir-

[4]*United States* v. *Rosselli*, 506 F. 2d 627 (C.A. 7), held that a warrantless entry into an apartment was not justified by the risk that a third party might make a warning call to the defendant. The court concluded that the risk of the call could have been avoided by leaving an agent with the third party while a warrant was being secured. The agents lacked a similar option here, because they did not have probable cause to arrest petitioner until Gunn gave his signal, and once the arrest had been made the agents could " 'reasonably conclude that the evidence * * * [would] be destroyed or removed before they * * * [could] secure a warrant' " (*id.* at 630).

cumstances. *Schneckloth* v. *Bustamonte*, 412 U.S. 218; *United States* v. *Watson*, 423 U.S. 411.[5]

3. Petitioner finally contends (Pet. 23-24) that the cocaine should have been suppressed because the government failed to prove that the agents announced their purpose and authority before they entered his home. The court of appeals held, however, that petitioner had failed to meet his burden of establishing a *prima facie* case by presenting at least "some testimony which establishes the factual basis for a claim that [18 U.S.C. 3109] has been violated" (Pet. App. 9).

The court did not err by requiring petitioner to introduce at least some evidence to demonstrate non-compliance with the statute before the government is required to justify its agents' conduct. As the court of appeals noted (Pet. App. 9), the movant's burden is "not great, and parallels the necessity that a defendant assert a search was conducted without a warrant before the Government is forced to prove the search was reasonable within the confines of the Fourth Amendment."

Petitioner contends that Agent Brown's testimony made out a *prime facie* showing that the agents did not announce their purpose or authority before entering. Agent Brown, however, was asked only whether Agent

[5]Petitioner's reliance (Pet. 20) on *United States* v. *Calhoun*, 542 F. 2d 1094 (C.A. 9), is unwarranted. In *Calhoun* the defendant maintained that there were no narcotics in his house prior to the search, the search occurred in the middle of the night, and his innocent wife was handcuffed. The court held that a consent to a general search had been coerced. In the present case, by contrast, petitioner's consent was preceded by an incriminatory statement, his wife was arrested as an active participant in the drug trade, the search was conducted in the middle of the day, no threats of force were made, and the consent was particularized.

Andrejko had made an announcement; Agent Brown testified that "[h]e could have, but I don't know" (Tr. 36). Agent Brown did not discuss announcements made by other agents, and the evidence did not show whether he was in a position to have heard any announcement. As the court of appeals stated (Pet. App. 9): "Neither Agent Brown, nor [petitioner], nor [petitioner's] neighbor, all of whom were present at the scene, testified that the agent failed to give the required announcement. Positive testimony showed that he knocked." Petitioner was present when the entry took place; his failure to testify that the agents did not knock and announce their authority is a telling omission.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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